Filed 12/29/09 In re Miguel O. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re MIGUEL O., et al., Persons Coming Under the Juvenile Court Law.	B214775 (Los Angeles County Super. Ct. No. CK71689)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ROSA O., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Stanley Genser, Commissioner. Affirmed.

Carrie Clarke, under appointment by the Court of Appeal, for Defendant and Appellant.

James M. Owens, Assistant County Counsel, and Denise M. Hippach, Associate County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Rosa O. (Mother) appeals from the juvenile court's order made in a Welfare and Institutions Code section 366.26[1] hearing establishing a plan of adoption for her daughter, Viviana O., and her son, Hugo O. Mother contends on appeal that the juvenile court erred in terminating her parental rights because the court had failed to enforce its visitation order, and impermissibly delegated to the children the decision whether visitation would occur. She asserts that as a result she did not have the opportunity to maintain or establish a beneficial parental relationship, which could have been a basis upon which she could oppose the termination of her parental rights. We disagree and affirm the challenged order.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2007, DCFS received a referral alleging Mother and Father abused alcohol and could not provide appropriate care for their children.[2] The Los Angeles County Department of Children and Family Services (DCFS) offered Mother voluntary family reunification services, pursuant to which Mother agreed to participate in a substance abuse program, random testing, parenting classes, AA meetings, and psychiatric counseling. Her son, Miguel O. (born in December 1990),[3] her daughter, Viviana O. (born in September 1993), and her son, Hugo O. (born in October 1999), were placed in the care of their adult brother.

---

1 All statutory references are to the Welfare and Institutions Code.

2 Father died in November 2007, prior to the filing of the section 300 petition in this matter.

3 Miguel was ordered into a permanent plan living arrangement on December 22, 2008. He is not a party to this appeal.

From June 2007 until February 2008, Mother relapsed into alcohol abuse twice. The adult brother told the social worker that Mother drank alcohol day and night for one week. DCFS learned that the adult brother used marijuana in the children's presence; he tested positive for marijuana in January 2008. The children were taken into protective custody and placed with a maternal uncle in February 2008.

On February 20, 2008, DCFS filed a section 300 petition, alleging Mother abused alcohol daily, which rendered her incapable of providing regular care and supervision for the children; voluntary services had failed to resolve the problem. The petition also alleged that Mother established a detrimental and endangering home environment by allowing the children's adult brother to reside in the home and have unlimited access to them even though he abused marijuana.

At the detention hearing in February 2008, Mother's appointed counsel told the court she was already in a rehabilitation program. The court ordered Mother to participate in alcohol testing, and ordered monitored visits as long as Mother was not under the influence of alcohol. The maternal uncle was approved to monitor visits.

DCFS reported in March 2008 that the children said Mother had abused alcohol for a long time, well before Father died. Hugo said that after Father died, Mother got drunk every day. Viviana said Mother became violent when she drank, made mean comments, and threatened to hit her. Viviana said she visited with Mother on March 1, 2008, but Mother was drunk and threatened to hit Viviana; the maternal uncle terminated the visit. Viviana told the social worker that she had no desire to reunify with Mother whether she became sober or not. The children confirmed their adult brother smoked marijuana in the home.

The maternal aunt and uncle said Mother's alcohol abuse was longstanding, about ten years, and she had made no effort to treat her alcohol addiction. She used Father's death as an excuse to drink. Mother was still abusing alcohol, and had not visited the children.

The social worker was unable to interview Mother because she had not returned the social worker's calls. A clinician at Mother's former rehabilitation program told the social worker that Mother relapsed in February 2008 and had not participated in the program since then. DCFS recommended providing family reunification services.

Mother pleaded no contest to the section 300 petition on March 13, 2008. The court sustained the petition, and declared the children dependents. The court ordered DCFS to provide reunification services to Mother. Mother was ordered to participate in an alcohol rehabilitation program with random testing, parenting classes, individual counseling to address case issues and grief counseling, and conjoint therapy with the children when recommended by the therapists. Mother was granted monitored visits, but was instructed she could not visit if she consumed alcohol within 24 hours of the visit. The monitor was given discretion to refuse or terminate visits if Mother had been drinking.

Thereafter, DCFS provided Mother with the necessary referrals, but Mother did not comply with the case plan. She had expressed interest in the well being of the children to the social worker, but she continued to abuse alcohol. On several occasions, Mother went to the children's schools unannounced and intoxicated, and tried to visit the children. Viviana and Hugo were embarrassed and distressed by these visits, and told the social worker they did not wish to see Mother until she attended her classes and got better. The children had witnessed many years of Mother's alcohol abuse, and appeared to feel hopeless that Mother would ever live

a sober life. A clinician at an alcohol rehabilitation program Mother had attended in 2007 told the social worker that Mother's alcohol addiction was extensive, and that she would greatly benefit from an inpatient program. Mother refused, saying she was attending substance abuse classes at a church, but she failed to provide the social worker with any evidence of such attendance.

On August 7, 2008, at the request of the children's counsel, the court issued a temporary restraining order due to Mother's unauthorized visits to the children's schools. Mother was ordered to stay 100 yards from the children and their caregivers, their residence, and the children's schools, except for contact as required for court-ordered visitation. Mother was also prohibited from contacting them by telephone. The court then issued a three-year permanent restraining order to the same effect on August 20, 2008.

Termination of Reunification Services

A contested six-month review hearing (§ 366.21, subd. (e)) was held on September 4, 2008. The minor's counsel had requested that the matter be set for contest because she disagreed with DCFS's previous recommendation that reunification services for Mother should be continued for another six months. The minor's counsel did not believe it was in the children's best interests to continue reunification services, based on Mother's continued alcohol abuse and the children's desire not to have contact with her. On the day of the hearing, DCFS filed additional information with the court indicating that Mother failed to appear for alcohol testing on August 15, 2008, and tested negative on August 25, 2008. Mother had not provided DCFS with any evidence that she had enrolled in an alcohol rehabilitation program. Mother had not given the social worker current contact information. DCFS had reconsidered its recommendation and now

requested termination of family reunification services. At the hearing, the social worker argued that termination of reunification services was appropriate at the six-month review hearing even though the children were over three years of age, citing *In re Derrick S.*[4]

The social worker stated that Mother had contacted her each month and asked to visit the children, but the children refused to see her. Counsel for DCFS acknowledged that the children were not permitted to make the final decision on visitation; visitation was for the court to determine. Counsel for DCFS argued that the children were simply asking Mother to stop drinking and get help. Counsel for the children agreed that Mother's alcohol addiction continued unabated, and even the children's refusal to visit her until she sought help did not cause her to improve. Asked if she would be willing to enter an inpatient alcohol program immediately, Mother responded, "I'm going to think about it."

The court terminated Mother's reunification services, noting that Mother had not previously asked the court to intervene and enforce visitation. The court found that DCFS had made reasonable efforts to assist Mother with reunification but she failed and refused to comply, and there was no substantial probability that reunification would occur if Mother was given six additional months of services. However, the court rejected the minor's counsel's request that it find that visits were detrimental to the children. The court left the visitation order in place, and ordered visits to take place at the DCFS office. Mother was ordered to call and

---

[4] A minimum of 12 months of services will ordinarily be provided for a parent of a dependent child over the age of three, but services may be discontinued in the rare case when "the likelihood of reunification is," for whatever reason, "extremely low," as where the parent has already received or been offered reunification services, thus giving the juvenile court a basis for evaluating whether additional services will be utilized by the parent in the time remaining for reunification. (*In re Derrick S.* (2007) 156 Cal.App.4th 436, 448, 450; citing *In re Aryanna C.* (2005) 132 Cal.App.4th 1234, 1242.)

confirm visits 48 hours in advance. The court scheduled a section 366.26 permanency planning hearing for December 22, 2008. Mother was given notice of her right to file a writ petition, but did not do so.

Permanency Planning

The children thrived in their aunt and uncle's home, and wanted to be adopted by them. The caregivers wanted to adopt Viviana and Hugo. Viviana and Hugo continued to refuse to see Mother. In late August 2008, Mother had moved to northern California.

The section 366.26 hearing was continued to March 19, 2009. Viviana testified that she had told the social worker she did not want to visit Mother. She did not know if the social worker had scheduled any visits. Counsel stipulated that Hugo would testify he did not want to visit Mother.

The social worker testified that she repeatedly told the children they had to visit Mother, but they continued to say they did not want to see her. When Mother moved to northern California, the social worker told Mother she would arrange visitation when Mother returned to southern California. Mother did not request that the social worker set up visits. She asked how the children were doing, and the social worker said they were well, but they did not want to visit her. The social worker said Mother could send correspondence to her and she would give it to the children, or ask the social worker to arrange for telephone contact, but Mother never did so. Mother had last spoken to the social worker in December 2008. Before that, the social worker had last spoken to Mother in September 2008. When the social worker tried to reach Mother in January 2009, the phone number had been disconnected.

Mother testified through a Spanish language interpreter that she tried to call the social worker during the previous six months, but did not leave messages when the voicemail answered in English. However, the social worker said her outgoing voicemail message was in English and Spanish, and Mother could have left messages in Spanish. When Mother spoke to the social worker in December, Mother did not insist on visiting the children when she was told they refused to see her. Mother testified she had moved back to southern California in mid-December 2008, but had not given the social worker any contact information. She planned to return to northern California.

Counsel for the children argued that Mother had not made efforts to maintain regular visitation. Mother's counsel argued that it would be improper for the court to terminate her parental rights because she had not been afforded visitation, and was thus deprived of the opportunity to oppose termination of parental rights by showing she had established or maintained a beneficial relationship. Counsel pointed out that the court had never found that visits would be detrimental to the children. Rather, it was the children who decided that they did not want to visit with Mother. Citing *In re Hunter S.* (2006) 142 Cal.App.4th 1497, Mother's counsel asserted that absent a finding of detriment, a court must ensure that at least minimal visitation occurs before it can terminate parental rights. Counsel asked the court not to terminate parental rights, to take the section 366.26 hearing off calendar, and to order DCFS to assist Mother in visitation with the children in a therapeutic setting to determine if the relationship could be salvaged.

The court found that the most compelling testimony was from the social worker, who testified that she contacted Mother in northern California and told her the children did not want to visit her, but if she came to southern California the social worker would set up visits at the DCFS office; Mother never did that.

Mother did not make an effort to compel visitation when told the children did not want to visit her; she never insisted. She made little or no effort to have any contact with her children. The court found Mother had done too little to engage the children while they had been removed from her home. DCFS had offered to arrange visitation despite the children's refusal to visit. Mother also failed to maintain regular contact with DCFS. The court found *In re Hunter S.* to be inapplicable.

The court found by clear and convincing evidence that Viviana and Hugo were adoptable, and terminated Mother's parental rights. The court ordered DCFS to pursue adoption by the maternal aunt and uncle as the permanent plan for the children.

This appeal followed.

DISCUSSION

Mother contends on appeal that the juvenile court was incorrect in finding *In re Hunter S., supra*, 142 Cal.App.4th 1497 (*Hunter S.*), inapplicable, because Mother was not afforded reasonable visitation. The children were permitted to determine that visits would not occur, and Mother was thus deprived of the chance to establish a relationship with the children that would permit her to argue against termination of parental rights. We disagree.

In *Hunter S.*, a five-year-old child was removed from his mother's custody and placed with his grandmother; his mother was granted reunification services. The mother was incarcerated, but substantially complied with her case plan, and remained in contact with the child by letter and telephone. (*Id.* at pp. 1500-1501.) After the mother was released from prison, the court ordered DCFS to arrange for visitation. However, the child began refusing to visit with her or have any contact

with her, despite efforts by DCFS, his caregivers, and his therapist to convince him to do so. (*Id.* at p. 1501.) The mother remained sober and employed, and persevered in her efforts to visit the child. (*Id.* at p. 1502.) The mother's attorney told the court she wanted to see her son in a therapeutic, or any other, setting, but the court said that as a practical matter, it was not going to force a child who is absolutely refusing to visit to do so. (*Ibid.*) The child had since been placed under his grandmother's legal guardianship. The court set a section 366.26 hearing to consider a new permanent plan of adoption, refusing the mother's request that the court order joint therapy for her with her son. (*Id.* at p. 1503.) The child continued to refuse to see his mother. The mother then filed a section 388 petition, asking the court to vacate the section 366.26 hearing and reinstate reunification services. The court denied the request, finding that although the mother had shown a substantial change of circumstances, she had not demonstrated it was in the child's best interest that he be returned to her custody. The court found the child adoptable, and terminated the mother's parental rights. (*Id.* at p. 1503-1504.)

On appeal, the court noted that in dependency proceedings a lack of visitation may virtually assure the erosion and termination of any meaningful relationship between the mother and the child. (*Hunter S.*, *supra*, 142 Cal.App.4th at p. 1504.) Visitation must continue even after termination of reunification services unless the court finds it would be detrimental to the child. (*Ibid.*) The statutory procedures which must be followed prior to termination of parental rights act as safeguards to protect the parent's due process rights. "If a parent is denied those safeguards through no fault of her own, her due process rights are compromised. Meaningful visitation is pivotal to the parent-child relationship, even after reunification services are terminated." (*Id.* at p. 1504.) By demonstrating the applicability of section 366.26, subdivision (c)(1)(B)(i), "even a

parent to whose custody a child cannot currently be returned has a final chance to avoid termination of parental rights if she can show she has maintained regular contact and visitation with her child, and the child would benefit from continuing the relationship. Obviously, the only way a parent has any hope of satisfying this statutory exception is if she maintains regular contact with her child." (*Id.* at pp. 1504-1505.) For a parent deprived of visitation, it is a foregone conclusion that she will not be able to establish the exception or have any meaningful chance to avoid the termination of parental rights. If a court grants visitation, it must also ensure that at least some visitation at a minimum level determined by the court itself will actually occur. (*Id.* at p. 1505; see *In re S.H.* (2003) 111 Cal.App.4th 310, 313.)

The appellate court noted that the juvenile court had made no finding that visitation would be detrimental. Rather, the court improperly permitted the child to have virtually complete discretion to veto visitation, without any oversight or direction by the court. The juvenile court may not, however, "impermissibly delegate to the child's therapist, DCFS or any third person, unlimited discretion to determine whether visitation is to occur. [Citation.] In no case may a child be allowed to control whether visitation occurs. [Citations.]" (*Hunter S., supra*, at p. 1505.)

The mother had consistently raised the issue of the juvenile court's failure to enforce its visitation order. The appellate court found that the failure to enforce the visitation order constituted error. (*Id.* at p. 1505.) By refusing to grant the mother's section 388 petition, the juvenile court abused its discretion and failed to rectify three years of error in failing to enforce the visitation orders. (*Id.* at pp. 1506-1508.) The appellate court reversed the order denying the mother's section 388 petition, and also reversed the order terminating parental rights. The matter

was remanded to the juvenile court to conduct a new section 388 hearing, at which time it would be appropriate for the court to consider if visits would be detrimental to the child. (*Id.* at p. 1508.)

We conclude that the court here correctly concluded that the factual scenario presented in this case differed markedly from that in *Hunter S.*, and compelled a different conclusion. In *Hunter S.*, the mother showed by word and by deed that she was committed to maintaining a relationship with her son. Here, Mother said she wanted to visit the children when she spoke to the social worker, but she did nothing positive to *demonstrate* her desire to see them. She repeatedly went to their schools in a drunken state, which embarrassed and distressed the children and resulted in the juvenile court issuing a permanent restraining order against her. She did not participate in any of the court-ordered programs, even though the children essentially agreed to see her if she would go to classes and get better. Her alcoholism clearly predominated over her desire to visit the children.

Mother did not bring the lack of visitation to the court's attention until the six-month review hearing, by which time DCFS and the minor's counsel were requesting termination of reunification services based on Mother's failure to comply with the voluntary family maintenance services plan, and her continued failure to comply with any court orders regarding her rehabilitation. The court granted that request, finding it unlikely that reunification would occur in the following six months. Mother did not file a writ petition challenging the termination of reunification services based on lack of adequate efforts by DCFS, or for any other reason.

More importantly, shortly thereafter Mother chose to move to northern California. She rarely contacted the social worker, and did not participate in any programs. When she did speak to the social worker, she expressed a desire to visit

the children, but simply acquiesced when told the children did not want to see her. The social worker had told the children they had to visit Mother, and told Mother she *would* arrange visits when Mother came into town. Mother had returned to southern California in December 2008, but had not made that clear to the social worker or provided reliable contact information. She indicated at the section 366.26 hearing that she might return to northern California. In short, Mother expressed a desire to visit the children, and that she "felt badly" that the children did not want to visit her, but she made no effort to change their minds through her actions and failed to take steps available to her to see the children. The critical failure that resulted in there being no visitation was on Mother's part, not on the part of DCFS or the court. The children, having lived with Mother's alcoholism for a very long time, did not want to visit her if she did not try to rehabilitate herself, but they did not ultimately control the decision whether visitation would occur; Mother did. We find no error in the court's ordering parental rights terminated.

DISPOSITION

The order of March 19, 2009 terminating parental rights is affirmed in full.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.